In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1700

CHARLES E. VARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on five counts charging use of the mails in connection with a scheme to defraud a bank, in violation of 18 U.S.C. 1341. He was sentenced to concurrent prison terms of one year. The court of appeals affirmed *per curiam*, 437 F. 2d 1195 (Pet. App. 3-8), and denied a petition for rehearing with a further opinion (Pet. App. 9-12).

The evidence showed that petitioner engaged in a scheme to use drafts drawn on distant banks and deposited to his account in a Florida bank to obtain credit to which he knew he was not entitled. Petitioner was an officer of the Florida bank, and arranged to receive immediate credit on his account when each deposit was made. The drafts were thereafter dishonored by the distant banks and returned. However, petitioner enjoyed the credit prior to dishonor, which took as long as a month.

Petitioner contends here, as he did in the court below, that the indictment was fatally defective. The indictment charged that petitioner "wilfully submit-[ted] to the Bank of South Brevard, Melbourne, Florida, false and fraudulent bank drafts as deposits to an account maintained by him at said bank" (Pet. App. 3). It also alleged that petitioner was on the board of directors of the bank at the time each draft was deposited, that "on each occasion of the submission of the false and fraudulent drafts the aforementioned bank account was in an overdrawn status," and that as a result "the aforesaid account was credited with the particular amount and was brought into a current status" (*id.* at 4). Each count charged the use of the United States mails in the mailing of a particular draft.

Petitioner's challenge to the indictment is premised on his assertion that it incorrectly designated the instruments involved as "bank drafts" and did not sufficiently detail in what manner the drafts were false and fraudulent. While these matters might warrant a timely motion for a bill of particulars, there is no

basis for the asserted right to have the indictment dismissed in the circumstances of this case. Petitioner's counsel was given copies of the "drafts" on which the indictment was based well in advance of trial. He was fully aware that the government intended to prove that petitioner deposited drafts which he knew to be worthless. Thus counsel knew the nature of the government's case, and the alleged defects in the indictment were not prejudicial to the preparation of petitioner's defense (see Pet. App. 10-11). Moreover, counsel did not object to the form of the indictment until after trial, in a motion in arrest of judgment, and then did so in response to questions raised by the trial judge (see Pet. 4-5). As the court below concluded, on the facts of this case the trial judge could properly reject this tardy challenge (see Pet. App. 4-5, 6-7). See *Hagner* v. *United States*, 285 U.S. 437.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

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